Neutral Citation Number: **[2019] EWHC 97 (Comm)**

Case No: CL-2013-000683

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: Tuesday 22nd January 2019

Before :

Mr Justice Andrew Baker

- -

Between :

(1) KAZAKHSTAN KAGAZY PLC
(2) KAZAKHSTAN KAGAZY PLC
(3) PRIME ESTATE ACTIVITIES KAZAKHSTAN LLP
(4) PEAK AKZHAL LLP
(5) ASTANA - CONTRACT JSC
(6) PARAGON DEVELOPMENT LLP
- and -
(1) BAGLAN ABDULLAYEVICH ZHUNUS
(formerly BAGLAN ABDULLAYEVICH ZHUNUSSOV)
(2) MAKSAT ASKARULY ARIP
(3) SHYNAR DIKHANBAYEVA
(4) SHOLPAN ARIP
(5) LARISSA ASILBEKOVA
HARBOUR FUND III LP Claimants

- and –

(1) DENCORA LIMITED Defendants
(Applicant, and Respondent to the Charging Order Application dated 6 November 2018)
(2) STANDCORP LIMITED
(Applicant, and Respondent to the Charging Order Application dated 27 April 2018)
and others

- -

Robert Howe QC and Jonathan Miller (instructed by **Allen & Overy LLP**) for the **Claimants**
Elizabeth Weaver (instructed by **Signature Lititgation LLP**) for the **Applicants**
Other Parties did not appear and were not represented at this hearing

Hearing date: 22nd January 2019

- -

JUDGMENT

Mr Justice Andrew Baker Tuesday, 22nd January 2019

Ruling by MR JUSTICE ANDREW BAKER

1. The applications before the court today are by Dencora Limited and Standcorp Limited by application notices dated 2 and 17 January 2019. The earlier application notice also includes an application, not considered today, by Pilatus Trustees Limited, who claim now to be a trustee of the WS settlement, to enable a distribution to be made to Mrs Arip.
2. The applications by Dencora and Standcorp relate respectively to a property known as 19 Wycombe Square, London ('the Wycombe Property'), and Apartment 304, Burlington Gate, London ('the Burlington Apartment'). The Wycombe Property is owned by Dencora Limited, that is to say Dencora Limited is the registered legal title holder. The Burlington Apartment is owned by Standcorp Limited, that is to say Standcorp Limited is the registered legal title holder.
3. There is a substantial case, not yet before the court for final determination, that each of the properties is owned beneficially by Mr Arip, the judgment debtor in this matter, who owes the claimants under the money judgment resulting from the decision at trial in these proceedings before Mr Justice Picken something of the order of $300 million.
4. The claimants, on the basis, as they say, that the Wycombe Property and the Burlington Apartment are beneficially assets of Mr Arip, will say that any dealing with either property, including by way of letting them on two-year tenancies, as is now proposed, is prohibited by the worldwide freezing order in respect of Mr Arip's assets.
5. If the claimants do not establish that Mr Arip is the or a beneficial owner of those properties, it is , as is at least a possibility that it may be held that Mrs Arip is a or the beneficial owner of those properties, but then equally the claimants would say that dealings with the properties would be caught by the worldwide freezing order now in place in respect of her assets in support of the claimants' claim against her for a third-party costs order arising out of her funding of Mr Arip's unsuccessful defence of the original proceedings.

6. Against all of that background, the applications today are for variations of interim charging orders granted in May of last year in respect of the Burlington Apartment and November of last year in respect of the Wycombe Property, and of both of the freezing orders I have mentioned, so as to provide, in primary substance, that nothing in any of those orders is to restrict Standcorp, respectively Dencora, from granting a tenancy in respect of the relevant property.

7. The reason there are two application notices is because the application, as initially issued on 2 January, sought orders only in relation to the charging orders and the freezing order in respect of Mr Arip's assets. It was appreciated shortly before this matter first was before the court for possible substantive consideration, on Friday of last week, that, for completeness and against the possibility that I have identified, a similar application should be made in respect of the Mrs Arip freezing order, and so a further application notice was issued last Thursday.

8. It appears to me to be common ground that, for present purposes, the separate application, as it now is, in relation to the freezing order concerning Mrs Arip's assets does not give rise to different or additional considerations. If, notwithstanding in particular what the claimants will say is the prima facie case as to ownership by Mr Arip, which they will pursue further in the charging order proceedings, it is appropriate to grant some relevant permission, then likewise and on whatever terms are thought appropriate by reference to Mr Arip so far as concerns Mrs Arip.

9. The argument of the application has ranged over a significant number of possible issues. However, in my judgment, what is most stark is that in principle it is, I have no doubt, in all parties' interests that both the Wycombe Property and the Burlington Apartment be let on arm's length and commercial terms if those terms and the surrounding circumstances can satisfactorily protect the claimants' prospective interest in enforcing the judgment debt against the properties themselves if their position as to beneficial ownership is ultimately vindicated in the charging order proceedings.

10. Although the evidence has not always been consistent about this, the Wycombe Property may have been in use for some significant period until a point last year as the or a family residence for the Arip family. But it is Dencora's clear case and evidence that that is no longer an intended use of that property for the immediate and shorter-term future. The Wycombe Property appears to be a substantial and high value property in respect of which it is said that a tenant has been found after a relatively substantial period of marketing at a rental of as much as £7,000 per week.
11. In the case of the Burlington Apartment, it appears to have been acquired as an investment property, always with a view to its being rented out, if not simply sold on, hopefully for profit. It is in a sense a sister property to three other apartments in the same development at Burlington Gate in Cork Street. The other three properties are in fact now subject to two-year tenancies with similar, although not identical, break clauses. It is said and the evidence is that there may be tenants available for the Burlington Apartment for a rental of £2,300 per week, which appears to be in line with the rentals at which the sister apartments have been let -- indeed it is a somewhat better rate, which may only be a reflection of movements in the market, I know not, than two of the three sister apartments currently enjoy.
12. There are, however, as it seems to me, real grounds for a number, if not necessarily all, of the concerns that the claimants have raised about the arrangements that will surround the granting of any tenancies, if permission were to be agreed or granted by the court, in part arising out of the surprising, to my mind, lateness in the history of the applicants' attempts to find tenants with which they raised with the claimants and, as a result, ultimately with the court, the desire for there to be permission to let the properties out by way of the variations of the orders that are sought.
13. It is said, and there is evidence to the effect, that the claimants were approached for consent, and when that was not immediately forthcoming in unqualified terms, the application was then

issued, because only as of mid-December or so was it appreciated that the permission of the court might be needed since the claimants plainly assert in the context of the charging order proceedings that the properties are beneficially owned by Mr, or perhaps Mrs, or perhaps Mr and Mrs, Arip.

14. That proposition, namely that the claimants so asserted as to beneficial ownership is not new to December of last year, however, but has been in play for many months, and the plain and obvious consequence, should that position be vindicated and established in due course, that the properties themselves would therefore be currently subject to one or other or both of the worldwide freezing orders, is not a complex or sophisticated conclusion to have drawn.
15. It is in those circumstances surprising to the court that it should be suggested, firstly, that the three sister properties at the Burlington Gate development should have been let out without considering the possible need to seek agreement from the claimants or permission from the court, and that the Wycombe Property, it is said, has been actively marketed for rental for upwards of six months, since about May of last year, before it occurred to anyone to approach the claimants and, if necessary, the court.
16. In those circumstances, in my judgment, and although, as I shall come on to explain, it seems to me the claimants in certain respects may have sought to impose conditions on any possible consent that go further than are required to protect their interests relevant to this application, the claimants' response, in the limited time given to them to respond, has been a reasonable one, in which they indeed have been clear that the idea in principle of letting the properties out so as to generate a commercial return, potentially for the benefit of all concerned, is not resisted but rather their concern is, and is only, to see their interests protected, as a judgment creditor seeking to enforce a very substantial judgment in the context of the charging order proceedings in which there will be a trial of the question of beneficial ownership of the properties.

17. In those circumstances, the order I propose to make today is that each of the relevant orders be varied so as to include a provision that nothing in the order in question shall restrict the relevant applicant from granting a tenancy over the respective property for a term not to exceed 24 months and otherwise on terms (of the tenancies themselves and of the consent or permission for them to be granted) agreed by the claimants or, in default of agreement, approved by the court.
18. In my judgment, it is not appropriate or possible, notwithstanding the degree of detail into which the parties' submissions have descended, for the court today to micro-manage the precise terms upon which the claimants ought to be expected to agree to tenancies being permitted, or the court would approve the conclusion of tenancies. It does seem to me, accepting one particular submission of Mr Howe QC, that but for the lateness relative to the marketing of the properties with which the applicants have gone to the claimants and ultimately come to the court for permission to let, they would have, and the court would reasonably expect them to have, put themselves in a position to have agreed detailed tenancy terms available for discussion and, in the absence of agreement, approval by the court.
19. To the extent that there is some real urgency, at all events in relation to the Wycombe Property, where it is said that the start date for the tenancy, or the proposed tenancy, it had been hoped, was to be 1 February, that urgency is itself the by-product of that lateness. It will now be incumbent upon the applicants (or at least Dencora, for the Wycombe Property) to act as speedily as they possibly can to put before the claimants, and if necessary the court, a detailed draft tenancy agreement for consideration and either agreement or approval.
20. In those circumstances, I do not propose to include within the order that is drawn up on the hearing today to go further than I have already stated as to the terms upon which the letting of the properties is to be permissible. I will however indicate some provisional views, in the light of the argument today.

21. Firstly, as things presently strike me, it would not be appropriate, in the balance of convenience and justice or injustice to the parties that the court must strike, to contemplate the letting of either property on terms that did not include break clauses. In the case of the Burlington Apartment, I would expect to see an entitlement in Standcorp to terminate the lease on notice from the expiry of an initial six-month period of the tenancy, by way of a mutual rolling break clause similar to that agreed for two of the three sister apartments. The third of the sister apartments also includes such a rolling break clause, but one which can only first be exercised to terminate the lease after twelve months rather than after six months. In the case of the Wycombe Property, as it presently seems to me, it would not be acceptable, in the balance that requires to be struck, for the property to be unconditionally bound to the tenant for more than twelve months. In those circumstances, I apprehend that, subject always to further negotiation between the parties, if the court ultimately has to approve a set of terms, it will expect to see that there is an entitlement, or that there would be an entitlement, in Dencora to break the lease after twelve months, and it may be at intervals thereafter as well, although that is a level of detail that can be considered in due course.
22. Secondly, as it presently seems to me, it will not be acceptable for the properties to be let, striking the balance that needs to be struck, unless it is on terms requiring the rental payments to be paid, as has been proposed in correspondence between the parties' solicitors, to Bank Julius Baer & Co Limited in Guernsey as regards the Burlington Apartment and the client account of Signature Litigation LLP, the applicants' solicitors, as regards the Wycombe Property, such rental income in each case to be used only for property expenses (including, in the case of the Burlington Apartment, payments falling due to Bank Julius Baer under their mortgage over that property), unless it is with the claimants' prior consent, such consent not to be unreasonably withheld, or under further order of the court.

23. In that regard, a particular issue arises which in reality is a separate and free-standing application that the applicants have access to the rental income for the purposes of meeting legal expenses within the charging order proceedings. In my judgment, the approach to that application is equivalent to any such application as might be made were the applicants themselves the subject of the respective freezing orders. I say that because the premise upon which the court is properly invited to intervene at all is the *prima facie* case that has been made out that the properties are beneficially owned by Mr Arip, or it may be by Mr and/or Mrs Arip, such that the rental income, when generated, would be caught by the freezing orders of which Dencora and Stancorp respectively have notice. Further, the express premise of this specific application is the assertion that the applicants need to have access to the prospective rental income in order to fund their litigation costs of the charging order proceedings.

24. In the case of each freezing order, in the context respectively of the enforcement of a judgment against Mr Arip and the prospective third-party costs order, if ultimately made, against Mrs Arip, there are existing decisions of the court that their assets are not to be used for the purposes of legal costs, and an application by them would need to be made.

25. In those circumstances, it does seem to me, in keeping with authorities in the freezing order field, that it was incumbent upon Dencora and Standcorp to demonstrate to the court by clear evidence that without access to the rental income generated by any tenancy now permitted by or pursuant to the order I make today, they will be unable to fund any defence of their interests in the charging order proceedings. In my judgment, the evidence put before the court by the applicants does not discharge that burden. The evidence is to the effect that each applicant's only or only significant asset is the property in question (plus, in the case of Standcorp, a reasonably substantial cash deposit at Bank Julius Baer but which must be maintained there under the terms of the mortgage). The assertion on behalf of each applicant is that *therefore* it needs to use any rental income that might be generated under the permission to let that may

result from the order now being made to fund legal representation. But that is a *non sequitur*. The applicants' present applications, to the extent they seek to vary the freezing orders to permit the use of rental income, if caught thereby, for legal costs, are therefore dismissed.

26. Thirdly, then, as to provisional views, as it seems to me to the extent that the claimants have sought in correspondence to persuade the applicants to agree both additional entitlements in the claimants concerning, as it has been described, "oversight" over the account or accounts into which rental payments would be made, or as to additional evidence or information concerning issues that have been the subject of evidence in the application, for example the sources hitherto of funds available to Dencora or Standcorp to defray expenses or, in the case of Standcorp, to meet mortgage payments, those are unnecessary conditions for the purposes of protecting the claimants' relevant interests.

27. That is not to say that information of the sort requested by the claimants might not be highly material in other contexts if, in due course, the court finds itself considering other matters, including possibly in the future any application that might be made asserting that there have in the past been failures fully to comply with the restrictions of the freezing orders. If in the context of any such future applications the sort of information requested is not provided, it might be that a court will find itself drawing appropriate inferences. However, in those respects, I agree with the submissions of Miss Weaver on behalf of the applicants that they are not matters required for the purpose of preserving and protecting the claimants' relevant interests in connection with the charging order proceedings.

28. I invite the parties to provide a draft order reflecting the judgment I have now given, including if possible (or if not that can come another day) revised versions of the various original orders that will stand amended by the order made today.